Supreme Court of the United States, 1

OCTOBER TERM, 1899.

No. 176.

EDWARD B. WESLEY,
Appellant,

vs.

HOWARD P. EELLS.

Motion. 2

Now comes J. D. M. Shaw, a citizen and taxpayer of the State of South Carolina, acting on behalf of himself only, by William A. Barber, his attorney, and respectfully moves the Court for an order allowing him to file such brief and submit such argument in this case as may appear essential to a full and complete presentation of the question involved herein, as the same affects his interest.

WILLIAM A. BARBER,
Counsel for J. D. M. Shaw for
the purpose of this motion.

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Appellant,

vs.

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Notice.

To Messrs. Wm. H. Lyles, J. M. Shallenberger and A. St. J. Newberry, counsel of record in the above stated case:

Please take notice that on Monday, the 15th day of January, A. D. 1900, at the opening of the Court, or as soon thereafter as counsel can be heard, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States at Washington, D. C., for the decision of said Court thereon.

Annexed hereto is a statement of facts to be submitted with said motion in support thereof.

WILLIAM A. BARBER,
Counsel for J. D. M. Shaw for purpose of this motion.

STATEMENT.

J. D. M. Shaw, on whose behalf this motion is submitted, is a citizen and taxpayer of the County of Laurens, in the State of South Carolina.

This case is not a *bona fide* effort on the part of appellant to compel the respondent to comply with a contract for the purchase of the property in Columbia, South Carolina, described in the bill as "Agricultural Hall." It is an effort to get from this Court an opinion as to the validity of an alleged obligation of the State of South Carolina. By the pleadings this is made the sole question. As a taxpayer in that State, J. D. M. Shaw is manifestly interested in the result.

Whatever decision may be rendered upon that issue, the rights of the parties under the alleged contract, upon which this case is based, will not be affected by it.

When the appellant bought the Agricultural Hall in 1892, he did so for the sole purpose of testing the validity of the scrip now in question. This was the testimony of W. H. Lyles, Esquire, in the case of Tindal *v.* Wesley *et al.* See 167 U. S., 207:

"Q. When you made the purchase, you made it with a view of compelling the State to take the deferred payment in revenue bond scrip? A. Yes. Q. Did you happen to know whether the (209) revenue bond scrip had any value in the market? A. I don't know. Q. It has not? A. I don't know that it has. Q. Very little, if any? A. Yes. Q. You know Alexander? A. Yes; I have never seen him personally. Q. Do you know him as a poor man? A. Yes. Q. He and Mr. Wesley had no use for this property that you know of except to create the issue to which you have referred? A. That was the sole object for which it was purchased. Mr. Wesley regarded the property as worth the money, and even if he had to pay, he would not lose the money. Q. Mr. Wesley holds a large block of revenue bond scrip? A. Yes."

The decision in that case awarding possession of the premises to Mr. Wesley was rendered May 10, 1897.

10 The bill in this case alleges the date of the contract between Mr. Wesley and Mr. Eells as the day of , 1897. No copy of this contract appears in the pleadings or testimony. Of course, its execution is duly admitted by the defendant.

This suit was filed on the 19th day of January, 1898 (see transcript, fol. 14). The bill had been verified on the 27th day of December, 1897, and on the next day, the 28th, the defendant waived service of process and entered his appearance (see transcript, fol. 13).

Answer was filed February 3, 1898, and replication made on the next day, February 4th (see transcript, fols. 21–23).

11 On the following day, the 5th of February, counsel for both parties filed a stipulation to submit the case on documentary evidence and written arguments, the same being accompanied by a memorandum of the evidence introduced (see transcript, fol. 51). The transcript does not show the date on which the case was submitted, but the opinion of the Court was filed on the 14th day of November, 1898 (see transcript, fol. 73).

The recital of these dates is made because of the following facts:

On the 18th day of February, 1898, the Governor of South Carolina approved an act, duly passed by
12 the General Assembly, entitled "An Act to Define the Rights of the Sinking Fund Commission as to Unpaid Tax Claims, Forfeited and other Lands in the Control of the said Commission, and for the Management of the Same, and the Disposition of Other Assets." Section XI. is as follows:

"The said Commission is hereby authorized to make such disposition as it may deem advisable of the bond of J. W. Alexander, and the mortgage on the property in Columbia, known as 'Agricultural Hall,' executed to secure the same, which were given to secure the unpaid purchase money on said property, and which are now in the hands of the State Treasurer."

The Commissioners of the Sinking Fund met on 13
the 21st day of February, 1898, of which meeting the minutes are as follows:

" COLUMBIA, S. C., February 21, 1898.

The Board of Commissioners of the Sinking Fund met this day at 12 M. in the Office of the Secretary of State. Present:

W. H. Ellerbe, Governor; W. A. Barber, Attorney-General; J. P. Derham, Comptroller-General; W. H. Timmerman, State Treasurer; J. P. Thomas, Jr., Chr. H. W. & M. Com.; G. L. Buist, Ch. Senate Finance Com.

Upon motion, it was Ordered: Pursuant to author
ity conferred by Section XI. of an Act, entitled, 'An 14
Act to Define the Rights of the Sinking Fund Commission as to unpaid Tax Claims, Forfeited and Other Lands, in the Contrrol of the said Commission, and for the management of the same, and the Disposition of Other Assets,' approved Feby. 18, 1898.

Resolved, That the Commisssion deem it advisable that the Bond of J. W. Alexander, executed on the 2nd day of February, 1892, for the credit portion of the purchase money, for the property in Columbia, known as the 'Agricultural Hall,' be cancelled and the said property be discharged from the lien of the mortgage executed to secure the same.

Whereupon the Board then signed and executed the 15
instrument, of which the paper pasted below is a true copy:

STATE OF SOUTH CAROLINA:

KNOW ALL MEN BY THESE PRESENTS, That the Commissioners of the Sinking Fund, pursuant to authority conferred by Section XI. of an Act, entitled, 'An Act to define the Rights of the Sinking Fund Commission as to unpaid Tax Claims, Forfeited and Other Lands in the Control of said Commission, and for the Management of the same, and the Disposi-

16 tion of other Assets,' approved February 18, 1898, and a resolution this day passed thereunder, hereby cancel the bond of J. W. Alexander, executed on the 2nd day of February, 1892, for the credit portion of the purchase money for the property in Columbia known as the 'Agricultural Hall,' and discharge said property from the lien of the mortgages executed to secure the same.

Said Section XI. of the Act approved February 18, 1898, reads as follows: That the said Commission is hereby authorized to make such disposition as it may deem advisable of the bond of J. W. Alexander, and the mortgage on the property in Columbia, known as the 'Agricultural Hall,' exe-
17 cuted to secure the same, which were given to secure the unpaid purchase money on said property, and which are now in the hands of the State Treasurer.

Witness the hands and seals of the Commissioners of the Sinking Fund this twenty-first day of February, A. D. 1898.

Executed in the presence of:

N. W. BROOKER.
D. H. MEANS.

W. H. ELLERBE,
Governor. [L. S.]

18 W. H. TIMMERMAN,
State Treasurer. [L. S.]

GEORGE L. BUIST,
Ch. Senate Fin. Com. [L. S.]

J. P. DERHAM,
Comptroller-General. [L. S.]

JNO. P. THOMAS,
Ch. H. W. & M. Com. [L. S.]

WM. A. BARBER,
Attorney-General. [L. S.]

STATE OF SOUTH CAROLINA, }
Richland County. } 19

Personally appeared before me N. W. Brooker and made oath: That he saw the within named W. H. Ellerbe, Governor; W. H. Timmerman, State Treasurer; Geo. L. Buist, Chairman Senate Finance Committee; J. P. Derham, Comptroller-General; Jno. P. Thomas, Jr., Chairman House Ways and Means Committee, and Wm. A. Barber, Attorney-General, sign, seal and as their act and deed execute the within written instrument, and that he with D. H. Means witnessed the execution thereof.

N. W. BROOKER.

Sworn to before me this 21st }
day of February, 1898. } 20

D. H. MEANS,
Notary Public. [L. S.]"

Due notice of this action was given to all the parties interested, and the release was promptly recorded in the office R. M. C. for Richland County in R. E. Mtg. Book " A " " A," page 203. Proper certificates of these facts are filed with the Clerk of this Court.

Now note the dates and ask why was this cancellation not brought to the attention of the Circuit Court? More than seven months elapsed after the action of the General Assembly and the Sinking Fund Commission before this case was submitted. 21
During this time there stood the answer of Mr Eells setting up this mortgage, and yet Mr. Wesley made no effort whatever to apprise the Court of its cancellation. Worse still both parties permitted the Court to consider the case and render a decree, well knowing that, with the property discharged from the lien of the mortgage nothing but a moot question remained. Were they acting *bona fide?* When the Circuit Court held the Scrip invalid and the tender void we find Mr. Wesley appealing to this Court, with yet no suggestion that the mortgage is not in existence. They have already had the Circuit

22 Court to decide the case without giving all the facts and now would apparently have this Court do likewise. Is this suggestive of collusion? Has the jurisdiction of the Circuit Court been imposed upon? As between Mr. Wesley and Mr. Eells is there any practical question for this Court?

Then is not this whole case a collusive effort by these parties to have this Court in an agreed case between them decide an alleged liability of the State of South Carolina? Is it not a collusive effort to have the Court "declare for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it?" Mr. Lyles testified in the outset that the
23 "Agricultural Hall" was purchased with the sole object of testing that liability. This was manifestly also "the sole object" of the alleged sale to Mr. Eells—of Mr. Wesley's bill for specific performance—of Mr. Eells' acceptance of service and entry of appearance before the bill was filed—of the single issue made by the answer—of the submission of the case under stipulation—of no effort by either party to apprise the Circuit Court that the mortgage was duly canceled and satisfied and of the appeal to this Court.

No decision that the Court may render as to the validity of the Blue Ridge Bond Scrip can now affect the rights of these parties under the alleged
24 contract over which they claim to be litigating.

The taxpayer of the State of South Carolina and not the litigant in Ohio is the party whose interest is really involved in this controversy. The Court is, therefore, asked to permit the petitioner to file such brief and submit such argument as he may desire if the question affecting him is to be decided.

Respectfully submitted,

WILLIAM A. BARBER,
Counsel for J. D. M. Shaw.

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